

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 041/06

Principal facts

Personal details

1. Ms X is a 50 year old citizen of the People's Republic of China (PRC). Prior to entering Australia, she was a resident of Hong Kong from 1994. Ms X stated to Ombudsman staff that she is married and her husband is detained in the PRC and she has a son who lives overseas. Ms X also stated that she has a sister living in Australia and her mother and other siblings are living in the PRC.

Detention history

2. Ms X first arrived in Australia by air in August 1999 on a tourist visa; after leaving Australia, she returned on the same visa in March 2000. She was detained under s 189(2) of the *Migration Act 1958* in January 2001 at Villawood Immigration Detention Centre (Villawood IDC).

Visa applications

3. Ms X arrived in Australia on a tourist short stay visa that allowed multiple entries of three month stays. In May 2000, she was granted a Bridging Visa A and a tourist long stay visa.
4. In January 2001, Ms X departed Australia for Canada but was subject to a 'turnaround' at the Hawaii airport as the US Immigration authorities had refused her entry. Ms X returned to Sydney where the Department (DIMIA) advised that her visa was cancelled in accordance with s 116 because she had stated her intention was to pursue business interests while on a tourist visa with a 'no work' condition. Further, information on the DIMIA Movement Alerts System advised that there was an arrest warrant issued against her in the PRC for allegedly diverting company funds of 1.42 million Yuan (approx \$A254,000), and on suspicion of bribery. Ms X was refused immigration clearance and detained at Villawood IDC.
5. Protection Visa (PV) refused (March 2001); Refugee Review Tribunal (RRT) affirmed (June 2001); appeal to the Federal Court (FC) dismissed (November 2001); appeal to the Full FC (FFC) upheld by consent judgment (May 2002); RRT affirmed PV refusal (December 2002); FC allowed appeal for denial of procedural fairness (May 2003); RRT affirmed PV refusal (August 2003); FC dismissed appeal (November 2003); FFC allowed appeal for denial of procedural fairness (June 2004); RRT affirmed PV refusal (November 2004); FC dismissed appeal (December 2004); FFC dismissed appeal (July 2005); appeal for special leave to the High Court dismissed (October 2005). Contemporaneously, there were appeals to the Administrative Appeals Tribunal (AAT), FC and the FFC over access to documents under s 503A.
6. DIMIA advised that a submission was put to the Minister in September 2005 considering her detention intervention powers under s 195A. The Minister decided not to intervene (October 2005). DIMIA also advised that two requests under s 417 had been submitted on Ms X's behalf in October 2005, which remain outstanding.

Current immigration status

7. Ms X is currently detained at Villawood IDC. On 24 November 2005, DIMIA advised that the Minister is considering this case against her intervention guidelines taking into

account Australia's non-refoulement obligations under several international treaties of which Australia is a signatory, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR).

Removal details

8. Now that Ms X's litigation has ceased, DIMIA has advised that it will once again pursue removal options, depending on the outcome of her requests under s 417. As Ms X was a holder of a Hong Kong Document of Identity, removal to Hong Kong was an option that DIMIA had considered; however to date Ms X has failed to complete a travel document application form and her Hong Kong residency certificate has since expired.
9. Arrangements were made for her to leave Australia on 6 January 2001, however a FC order on that day restrained DIMIA from removing her as Ms X's solicitor had lodged an application for a PV.
10. DIMIA advises that it is currently assessing an interim measures request recently lodged by the United Nations Human Rights Commission (UNHRC) requesting that Ms X not be removed at the present time.

Ombudsman consideration

11. The DIMIA report to the Ombudsman under s 486N was received on 30 August 2005 (dated 10 August 2005).
12. Ms X was interviewed by Ombudsman staff at Villawood IDC on 13 September 2005. Her lawyers were present at this interview.
13. Ombudsman staff viewed the FC decisions, the FFC decisions, the four RRT decisions and the AAT decision; and relevant documents held by DIMIA.

Key issues

Business interests and criminal charges

14. The former business interests of Ms X and her husband is discussed in the RRT decisions and was raised during the interview with Ms X in October 2005. Though the issue is complex, her essential claim is that the legitimate business interests that she and her husband had in Hong Kong and the PRC involved general merchandise, machinery and chemical products. She stated that her husband was detained by Chinese authorities on politically contrived allegations that he had been involved in misappropriation of funds.
15. A translated newspaper article obtained from DIMIA, indicated that Ms X's husband, had been sentenced to death for accepting 4.89 million Yuan in bribes. It also stated that he granted a project to a company in 1994 and that his wife had received 40% of the company's shares. Ms X said during the interview that she expected her husband's death sentence to be carried-out in June 2006; however DIMIA confirmed in November 2005 that his sentence had been converted to a period in gaol.
16. The RRT decision in June 2001 stated that there was no evidence to suggest that Ms X had been targeted by Chinese authorities for reasons of her membership of her husband's family or of her own family. However, the RRT did say that the evidence indicated that she, as an individual, is wanted by the authorities in connection with misappropriation of funds, which may or may not have a connection with her husband's alleged illegal activities.

Health and welfare

17. DIMIA advises that Ms X was placed on suicide and self harm observation for two days in February 2005. Medical reports have confirmed that Ms X suffers from depression and is

on medication. She is seen by the onsite psychiatrist fortnightly. Ms X said that she rarely gets any visitors and that she has lost her appetite and has difficulty sleeping. Ms X was highly emotional during the interview with Ombudsman staff.

Security and safety

18. DIMIA records indicate that Ms X has some criminal allegations against her relating to her and her husband's alleged bribery activities in the PRC. There are no incident reports in relation to Ms X's behaviour during her time at Villawood IDC. There is no information before the Ombudsman that indicates that Ms X would pose a serious risk to the Australian community if she were released from detention. DIMIA is of the view that there is a risk that Ms X would abscond if released into the community.

Attitude to removal

19. Ms X is concerned about the prospect of being removed back to the PRC as she has a fear that she will be abducted at the airport, interrogated and persecuted. All indications suggest that her removal from Australia would likely be problematic.
20. Ms X said during the interview with Ombudsman staff that she would go to any other country except back to the PRC. She said that she *'would rather die in Villawood than be sent back to China'* as she fears being detained by Chinese authorities and the possibility of execution. Ms X was asked during the interview why she has such a fear, however she did not provide any substantive reasons.

Other Detention Issues

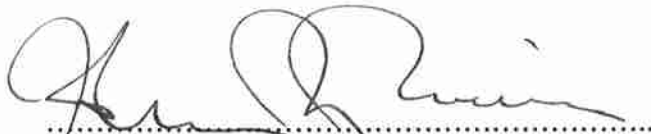
21. Ms X said that the *'detention centre is a terrible place, the food was not good and there is no respect shown to detainees'*.

Ombudsman assessment/recommendation

22. DIMIA movement records indicate that Ms X has a provincial arrest warrant issued against her by the Chinese authorities. If Ms X were to be returned to the PRC, she may face charges of misappropriation of funds and suspicion of bribery. The RRT decision indicated that Ms X denied her husband was corrupt or that she had assisted or conspired with him in corrupt dealings; she claimed to be the victim of the *'political machinations of her husband's former colleagues'* and that she faces *'persecution in the guise of prosecution'*. Documents from the PRC authorities claim that Ms X and her husband have committed bribery offences resulting in a financial gain of approximately 1.42 million Yuan (approx. \$A254,000).
23. Ms X claims that she would be persecuted if she returned to the PRC. In relation to this claim the Ombudsman notes that Ms X has exhaustively exercised her appeal rights against the decision of DIMIA to refuse her a PV. The RRT considered the matter four times, and in its most recent decision in November 2004 concluded that she did not satisfy the criteria for a PV; the Tribunal was not satisfied that she had a well-founded fear of being persecuted for a Convention reason if she returns to the PRC. As to her claim that she would face persecution or prosecution for her political opinion, the RRT noted that *'her political opinion, whatever it may be, does not appear to be known or of interest to the Chinese authorities and her evidence suggests that her problem may be to do with an investigation or allegation that she may have breached a law of general application related to misappropriation of funds'*. There were comments to the same effect in the FC decision of December 2004, that there was no ground for supposing that she would be treated differently from other persons facing criminal charges in the PRC.
24. Ms X claimed that the court hearings resulted in publicity in both Australian and United States Chinese language newspapers of her claims of feared persecution by Chinese authorities. She claimed that this has resulted in Chinese authorities becoming aware of her claims and that this would lead to her being persecuted if she were returned to the

PRC. The Ombudsman notes that since 2001, the court decisions suppressed her name and used a de-identifying convention when reporting their decisions, however, there were decisions where her name was not suppressed. The FC decision of December 2004 noted advice from the Australian Department of Foreign Affairs (DFAT) that she would not be persecuted by reason of her political opinion or that fact that she had applied for refugee status in Australia.

25. The Ombudsman notes that DIMIA's report stated that before she is removed from Australia it *'may need to seek an assurance from the Chinese authorities that she would not be executed'*. The Ombudsman considers that a precondition of any removal of Ms X back to the PRC must be that DIMIA seeks such assurances and satisfies itself that Ms X would not be executed. Advice from DFAT in relation to other persons returned to the PRC, who may have been subject to the death penalty, and the outcome of those cases, would assist in making such an assessment. Once such an assurance is given, DIMIA should ensure that Ms X is notified of that assurance. DIMIA and/or DFAT should monitor Ms X's circumstances if she is returned to the PRC to ensure that the PRC authorities abide by their undertaking. If an assurance is not given that Ms X will not be executed, the Ombudsman considers that advice should be provided by the Attorney-General's Department and DFAT on what options are available in relation to Ms X's future.
26. On balance, the Ombudsman is of the view that, subject to her fitness to travel and an assurance that she will not be executed, there is no substantive reason why Ms X should not be returned to Hong Kong (or mainland PRC) to face criminal charges in relation to allegations of misappropriation of funds and bribery. While Ms X may have a real subjective fear of persecution if she is returned, the available evidence indicates that it is more likely that Ms X may have to face prosecution in a court on her return.
27. Ms X has spent nearly five years in detention largely because of the exhaustive and ultimately unsuccessful litigation process. Her mental health appears to have deteriorated during her time in detention and she was placed on self-harm watch for two days in early 2005. Medical evidence suggests that there is a risk of further deterioration if she remains in detention for an indefinite period and there is a greater risk of self-harm. It is the Ombudsman's view that Ms X's current detention arrangements are not entirely appropriate in light of the effect on her physical and mental health.
28. The Ombudsman notes, however, that in Ms X's circumstances, there is a risk that she may abscond if released on a visa. Reporting and surety conditions may minimise this risk. Alternatively, community detention arrangements, with appropriate oversight of Ms X, may be more appropriate. The Ombudsman **recommends** that arrangements, alternative to continued detention in an immigration detention centre be considered in relation to Ms X while the outstanding matters in her case are being considered.
29. If Ms X remains in detention, the Ombudsman will shortly be required to prepare another report on her circumstances under s 486O. The recommendations in this report may need to be reassessed at that time if there is no significant change in her circumstances.
30. It is **recommended** that the Minister make a decision on Ms X's outstanding s 417 request and the UNHRC's interim measures request as soon as possible and in any case not later than the statutory period prescribed in s 486P for the tabling in Parliament of a version of this report (viz, within 15 sitting days of receiving the report).


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Prof. John McMillan
Commonwealth and Immigration Ombudsman

17 January 2006
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Date